A

Quek Siew Eng v Malayan Banking Bhd

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO S-03(IM)-46–08 OF 2020
NOR BEE ARIFFIN, LEE HENG CHEONG AND MARIANA YAHYA JJCA
5 DECEMBER 2022

C

Bankruptcy — Discharge — Application — Whether High Court wrongly dismissed bankrupt's discharge application on ground he had committed offence under Insolvency Act 1967 ('Act') — Whether commission of offence was not proven — Whether phrase '… bankrupt has committed an offence …' in s 33(4) of D *Act meant bankrupt must have been charged and convicted in a court of law for the offence — Whether statutory report of Director-General of Insolvency ('DGI') tendered at hearing of discharge application did not state bankrupt had committed any offence — Whether s 16 of Act merely required bankrupt to submit his* E *Statement of Affairs to DGI upon being adjudged bankrupt — Whether High Court wrong to hold bankrupt's failure to declare his co-ownership of a piece of land amounted to an offence under s 16*

The appellant had applied to the High Court under s 33(1) of the Insolvency F Act 1967 ('the Act') for an order discharging him from bankruptcy. The court dismissed the application after finding, inter alia, that the appellant had committed an offence under s 16 of the Act in failing to declare in his statement of affairs that he had co-owned a piece of land. The court also opined that because of the commission of that offence, the appellant should have premised his application under s 33(4) of the Act and not s 33(1). In his instant appeal, G the appellant argued that the High Court's decision was wrong because: (a) the report of the Director-General of Insolvency ('DGI') on the appellant's conduct and affairs — which had to be considered by the court under s 33(3) of the Act at the hearing of the discharge application — did not state that he had committed any offence; (b) there was no reason for the court to have H considered the matters stated in s 33(4) of the Act as they only arose if it was proven to the satisfaction of the court that the appellant had committed any offence; and (c) since the appellant had fulfilled the requirements under s 33(3) of the Act, his application for discharge should have been allowed.

I

Held, unanimously allowing the appeal, setting aside the High Court's decision and granting the appellant's application for discharge:

(1) The High Court's finding that the appellant had contravened s 16(1) of the Act or committed an offence under that provision was erroneous and

contradicted the DGI's statutory report that the appellant had duly complied with the law in submitting his statement of affairs. The finding that the appellant had committed an offence under s 16(3) of the Act in not disclosing his co-ownership of the land was a serious error because the only 'offence' contained in s 16(3) was the failure to submit a statement of affairs with the DGI within the stipulated timeframe and not the failure to disclose an asset in the statement of affairs. The High Court judge further erred when he held that the appellant should have filed his application for discharge under s 33(4) of the Act and not s 33(1) (see paras 13–20).

(2) The phrase '… that the bankrupt has committed an offence …' in s 33(4) of the Act meant the bankrupt must have been charged and convicted in a court of law for the offence/offences specified in that subsection. The appellant was never charged in court and convicted for an offence of not disclosing his co-ownership of the land. The DGI's statutory report did not state that the appellant had committed any offence. It was wrong of the High Court judge to have summarily and arbitrarily 'convicted' the appellant without giving him the right to be heard (see paras 21–22, 27 & 29).

(3) Since the appellant had not committed any offence, there was no basis for the High Court judge to have considered the appellant's application under s 33(4) of the Act. The application ought to have been considered under s 33(3) of the Act (see para 33).

(4) The DGI's statutory report supported the appellant's application for discharge. The appellant was 60 years old when he made the application and he had been living with the stigma of being a bankrupt for the last ten years. The court noted that the appellant was not made a bankrupt based on his personal debts but as a result of him standing as guarantor to secure banking facilities for the bona fide business of his companies. Considering all the facts and circumstances, the appellant had satisfied the requirements laid down in s 33(3) of the Act and his application for discharge ought to have been granted (see paras 35–40).

[Bahasa Malaysia summary

Perayu telah memohon kepada Mahkamah Tinggi di bawah s 33(1) Akta Insolvensi 1967 ('Akta tersebut') untuk mendapatkan satu perintah melepaskan beliau daripada muflis. Mahkamah menolak permohonan tersebut selepas mendapati, antara lain, bahawa perayu telah melakukan kesalahan di bawah s 16 Akta tersebut kerana gagal mengisytiharkan dalam Penyata Hal Ehwalnya bahawa beliau telah memiliki bersama sekeping tanah. Mahkamah juga berpendapat bahawa disebabkan kesalahan yang dilakukan, perayu sepatutnya membuat alasan permohonannya di bawah s 33(4) Akta tersebut dan bukannya s 33(1). Dalam rayuan semasa beliau, perayu berpendapat

bahawa keputusan Mahkamah Tinggi adalah salah kerana: (a) laporan Ketua Pengarah Insolvensi ('KPI') mengenai tindakan dan hal ehwal perayu — yang perlu dipertimbangkan oleh mahkamah di bawah s 33(3) Akta tersebut semasa pendengaran permohonan pelepasan — tidak menyatakan bahawa beliau telah melakukan apa-apa kesalahan; (b) tidak ada sebarang sebab untuk mahkamah mempertimbangkan perkara yang dinyatakan dalam s 33(4) Akta tersebut kerana ia hanya timbul sekiranya ia dapat dibuktikan di hadapan mahkamah bahawa perayu telah melakukan apa-apa kesalahan; dan (c) memandangkan perayu telah memenuhi keperluan di bawah s 33(3) Akta tersebut, permohonannya untuk pelepasan seharusnya dibenarkan.

Diputuskan, sebulat suara membenarkan rayuan, mengetepikan keputusan Mahkamah Tinggi dan membenarkan permohonan perayu untuk pelepasan:

(1) Dapatan Mahkamah Tinggi bahawa perayu telah melanggar s 16(1) Akta tersebut atau melakukan kesalahan di bawah peruntukan tersebut adalah salah dan bercanggah dengan laporan berkanun KPI bahawa perayu telah mematuhi undang-undang dengan sewajarnya dalam mengemukakan Penyata Hal Ehwalnya. Dapatan bahawa perayu telah melakukan kesalahan di bawah s 16(3) Akta tersebut kerana tidak mendedahkan pemilikan bersama tanah tersebut adalah satu kesilapan yang serius kerana satu-satunya 'kesalahan' yang terkandung dalam s 16(3) adalah kegagalan untuk mengemukakan Penyata Hal Ehwal dengan KPI dalam tempoh masa yang ditetapkan dan bukannya kegagalan untuk mendedahkan aset dalam Penyata Hal Ehwal. Hakim Mahkamah Tinggi terus terkhilaf apabila beliau berpendapat bahawa perayu sepatutnya memfailkan permohonannya untuk pelepasan di bawah s 33(4) Akta tersebut dan bukannya s 33(1) (lihat perenggan 13–20).

(2) Ungkapan '... bahawa seorang bankrap telah melakukan kesalahan ...' dalam s 33(4) Akta tersebut bermakna seorang bankrap mestilah telah didakwa dan disabitkan di mahkamah undang-undang bagi kesalahan/kesalahan-kesalahan yang dinyatakan dalam subseksyen tersebut. Perayu tidak pernah didakwa di mahkamah dan disabitkan atas kesalahan tidak mendedahkan pemilikan bersama tanah tersebut. Laporan berkanun KPI tidak menyatakan bahawa perayu telah melakukan sebarang kesalahan. Ia adalah salah bagi hakim Mahkamah Tinggi secara ringkas dan sewenang-wenangnya 'mensabitkan' perayu tanpa memberikannya hak untuk didengar (lihat perenggan 21–22, 27 & 29).

(3) Memandangkan perayu tidak melakukan apa-apa kesalahan, tiada asas bagi hakim Mahkamah Tinggi untuk menimbangkan permohonan perayu di bawah s 33(4) Akta tersebut. Permohonan tersebut sepatutnya dipertimbangkan di bawah s 33(3) Akta tersebut (lihat perenggan 33).

(4) Laporan berkanun KPI menyokong permohonan perayu untuk

pelepasan. Perayu berusia 60 tahun ketika membuat permohonan tersebut dan beliau hidup dengan stigma sebagai muflis sejak sepuluh tahun lalu. Mahkamah mengambil maklum bahawa perayu tidak dijadikan bankrap berdasarkan hutang peribadinya tetapi kerana beliau adalah seorang penjamin untuk mendapatkan kemudahan perbankan untuk perniagaan bona fide syarikatnya. Dengan mengambil kira semua fakta dan keadaan, perayu telah memenuhi keperluan yang ditetapkan dalam s 33(3) Akta tersebut dan permohonannya untuk pelepasan seharusnya telah dibenarkan (lihat perenggan 35–40).]

Cases referred to

Chinery, In Re [1884] 12 QBD 342 @ 346, CA (folld)
Development & Commercial Bank Bhd & Ors v Loke Theen Fatt [2009] MLJU 1443; [2010] 5 CLJ 583, HC (folld)
Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1; [2004] 4 CLJ 309, FC (refd)
Joshua Tan Pin Pin, Re; ex p William Jacks & Co (M) Sdn Bhd [2007] 4 MLJ 534; [2007] 3 CLJ 153, HC (folld)
Lee Ing Chin v Gan Yook Chin & Anor [2003] 2 MLJ 97; [2003] 2 CLJ 19, CA (refd)
Lim Hun Swee v Malaysia British Assurance Bhd (currently known as Allianz General Insurance Malaysia Bhd) & Ors (judgment creditors) [2011] 2 MLJ 218; [2010] 8 CLJ 680, CA (refd)
Lok Kew v Nam Fatt Marketing Sdn Bhd and another case [2019] MLJU 834; [2019] 1 LNS 1162, HC (distd)
Low Mun v Chung Khiaw Bank Ltd [1988] 1 MLJ 263; [1987] 2 CLJ 400; [1987] CLJ (Rep) 172, SC (folld)

Legislation referred to

Insolvency Act 1967 ss 3(3), 16, 16(1), (2), (3), 33, 33(1), (3), (4)
Penal Code ss 421, 422, 423, 424

Appeal from: Suit No BKI-29PB-54/7 of 2019 (High Court, Kota Kinabalu)

Norbert Yapp (Norbert Yapp & Assoc) for the appellant.
Wong Chik Yoong (Sia Mojilip) for the respondent.

Lee Heng Cheong JCA:

INTRODUCTION

[1] This is an appeal against the whole of the decision of the learned High Court judge ('learned judge') on 4 August 2020 in dismissing the appellant's/judgment debtor's appeal against the decision of the learned senior assistant registrar ('learned SAR'). The learned SAR dismissed the application

by the appellant/judgment debtor for an order of discharge from bankruptcy.

BACKGROUND

[2] The appellant/judgment debtor was adjudged a bankrupt on 24 June 2010. The appellant/judgment debtor then applied for a discharge pursuant to s 33(1) of the Insolvency Act 1967 ('the Act') on 17 July 2019 before the learned SAR.

[3] Upon hearing the parties, the learned SAR dismissed the application of the appellant/judgment debtor on 14 November 2019 and the appellant/judgment debtor appealed to the learned judge on 18 November 2019.

[4] On 4 August 2020, the learned judge dismissed the appellant/judgment debtor's appeal.

[5] The appellant/judgment debtor, being dissatisfied with the decision of the learned judge, appealed to this court.

FINDINGS AND DECISION OF THE HIGH COURT

[6] The learned judge dismissed the appellant/judgment debtor's application for discharge and found, inter alia, as follows:

(a) that the appellant/judgment debtor had committed an offence under s 16(3) of the Act as the appellant/judgment debtor had failed to disclose his co-owner ship of a piece of land in Sandakan with title reference CL 075328273 measuring approximately 911.37 sqmt ('the said land'), in his statement of affairs filed with the department of the Director General of Insolvency ('DGI') which is in contravention of the mandatory requirement of s 16(1) of the Act which is punishable under s 16(3) of the Act;

(b) that the appellant/judgment debtor's present application should be premised on s 33(4) of the Act and not on s 33(1) of the Act as the appellant/judgment debtor had committed an offence under the Act and the dividend payable should not be less than 50% as stipulated. Based on the statutory report dated 13 August 2019 of the Director General of Insolvency ('DGI's Statutory Report'), the dividend payable did not reach the minimum of 50% as stipulated under s 33(4) of the same Act; and

(c) although the DGI's Statutory Report did not state that the appellant/judgment debtor has committed any offence under the said Act, this court is not entirely bound by the findings made by the DGI in

the DGI's Statutory Report as laid down in the case of *Lok Kew v Nam Fatt Marketing Sdn Bhd and another case* [2019] MLJU 834; [2019] 1 LNS 1162.

THE APPELLANT'S CONTENTIONS

[7] Before us, the appellant advanced three main issues as follows:

(a) that the learned judge's finding that the appellant/judgment debtor's application for discharge should be premised under s 33(4) and not s 33(1) of the Act is erroneous;

(b) that the learned judge has failed to apply the correct principles in holding that the appellant/judgment debtor had committed an offence under s 16(1) of the Act and in doing so, failed to take proper consideration of the DGI's Statutory Report; and

(c) as the appellant/judgment debtor has not committed any bankruptcy offence, it would not be necessary to look into the whether the appellant/judgment debtor has satisfied the requirements under s 33(4) of the Act for an order of discharge. Thus, the appellant/judgment debtor's application for discharge would naturally fall under s 33(3) of the Act. In fact, the appellant/judgment debtor has satisfied the requirements laid down in s 33(3) of the Act and ought to be discharged as a bankrupt.

THE RESPONDENT'S CONTENTIONS

[8] Before us, the respondent/judgment creditor contended, inter alia, as follows:

(a) that the learned judge correctly decided that the appellant/judgment debtor's application must be dealt with under s 33(4) of the Act due to various offences committed by the appellant/judgment debtor;

(b) that once an application has been made under s 33(1) of the Act, the court was only required to appoint a day for the hearing of the application which the court had dutifully complied. The procedural requirement of s 33(1) of the Act was fulfilled by the court;

(c) that the learned judge did not err in law for not considering that the said land has been subsequently sold through the DGI. The appellant/judgment debtor had committed an offence under s 16(1) and 16(3) of the Act for non-disclosure of the said land in his statement of affairs. The subsequent sale of the said land has no relevance whatsoever to the offence under s 16(1) and/or 16(3) of the Act;

(d) that the learned judge did not err in law in finding that the appellant/judgment debtor had committed an offence even though there was no conviction;

(e) that the learned judge did not err in law and/or in fact in not considering the High Court case of *Re Joshua Tan Pin Pin; ex p William Jacks & Co (M) Sdn Bhd* [2007] 4 MLJ 534; [2007] 3 CLJ 153 which states that s 33(4) of the Act is only activated when the bankrupt has been convicted of a bankruptcy offence;

(f) that the learned judge had given due consideration of DGI's Statutory Report as required by the case of *Lim Hun Swee v Malaysia British Assurance Bhd (currently known as Allianz General Insurance Malaysia Bhd) & Ors (judgment creditors)* [2011] 2 MLJ 218; [2010] 8 CLJ 680 because the learned judge has discovered, from the DGI's Statutory Report, crucial facts such as the failure of the appellant/judgment debtor to disclose the said land in his statement of affairs and that the DGI had subsequently discovered about the said land from the land office; and

(g) that the learned judge has found that the appellant/judgment debtor had contravened s 16(1) of the Act and hence, committed an offence punishable under s 16(3) of the Act, thus, the learned judge was correct to dismiss the appeal/application of the appellant/judgment debtor.

OUR ANALYSIS AND FINDINGS

[9] We were mindful of the limited role of the appellate court in relation to findings of facts made by the court of first instance. In the case of *Lee Ing Chin v Gan Yook Chin & Anor* [2003] 2 MLJ 97; [2003] 2 CLJ 19 where the Court of Appeal held as follows:

> ... an appellate court will not, generally speaking, intervene unless the trial court is shown to be plainly wrong in arriving at its decision. *But appellate interference will take place in cases where there has been no or insufficient judicial appreciation of the evidence.* (Emphasis added.)

[10] Reference is also made to the decision of the Federal Court in *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309 where the Federal Court held that the test of 'insufficient judicial appreciation of evidence' adopted by the Court of Appeal was in relation to the process of determining whether or not the trial court had arrived at its decision or findings correctly on the basis of the relevant law and the established evidence.

[11] Bearing in mind the above principles distilled from the above cases, we will now deal with the appellant/judgment debtor's appeal.

[12] In the present case, the appellant/judgment debtor is applying for a discharge by the court pursuant to s 33 of the Act which states as follows:

Section 33:

(1) *A bankrupt may at any time after being adjudged bankrupt apply to the court for an order of discharge, and the court shall appoint a day for hearing the application.*

(2) (Deleted)

(3) *On the hearing of the application the court shall take into consideration a report of the Director General of Insolvency as to the bankrupt's conduct and affairs, including a report as to the bankrupt's conduct during the proceedings under his bankruptcy, and may either grant or refuse an absolute order of discharge, or suspend the operation order of discharge subject to any conditions with respect to any earnings or income which may afterwards become due to the bankrupt, or with respect to his after-acquired properly.*

(4) *In all cases where it is proved to the satisfaction of the court that the bankrupt has committed any offence under this Act or under any written law repealed by this Act or under section 421, 422, 423 or 424 of the Penal Code [Act 574] the court shall unless for special reasons it otherwise determines either refuse the discharge or suspend the operation of the order until a dividend of not less than fifty per centum has been paid to the creditors, and on proof of any of the facts mentioned in subsection (6) the court shall either —*

(a) *refuse the order; or*

(b) *suspend the operation of the order for a specified time; or*

(c) *suspend the operation of the order until a dividend of not less than fifty per centum has been paid to the creditors; or*

(d) *grant an order of discharge subject to such conditions as aforesaid.*

The powers of suspending and attaching conditions to a bankrupt's discharge may be exercised concurrently.

(5) ...

(6) ...

(7) For the purposes of this section a bankrupt's assets shall be deemed of a value equal to fifty ringgit per centum of the amount of his unsecured liabilities when the court is satisfied that the property of the bankrupt has realized or is likely to realize or with due care in realization might have realized an amount equal to fifty ringgit per centum of the amount of his unsecured liabilities and a report by the Director General of Insolvency shall be prima facie evidence of the amount of such liabilities. *For the purposes of this section the report of the Director General of Insolvency shall be prima facie evidence of the statements therein contained.* (Emphasis added.)

[13] Insofar as the learned judge's finding that the appellant/judgment

A debtor's application for discharge should be premised under s 33(4) and not s 33(1) of the Act, we are inclined to agree with the appellant/judgment debtor's contention that this particular finding of the learned judge is erroneous.

B **[14]** Firstly, the learned judge found that the appellant/judgment debtor contravened s 16(1) of the Act or committed an offence under this provision. This finding contradicts with the DGI's finding in the DGI's Statutory Report that the appellant/judgment debtor has duly complied with the law regarding the submission of his statement of affairs which was filed on 6 July 2010 within C the stipulated 21 days from the date of service of the receiving and adjudication orders granted in respect of the appellant/judgment debtor.

[15] Secondly, the learned judge's finding that the appellant/judgment committed an offence under s 16(3) of the Act, for not disclosing his D co-ownership of the said land is misconceived and erroneous as the 'offence' referred to, in s 16(3) of the Act relates to failure to submit the statement of affairs within 21 days and not the omission to disclose an asset in the statement of affairs which will lead to an offence under s 33(4) of the Act.

E **[16]** Section 16(1) of the Act states as follows:

> (1) Where a bankruptcy order is made against a debtor he shall make out and *submit to the Director General of Insolvency a statement of and in relation to his affairs in the prescribed form, verified by affidavit, showing the particulars of the his assets, debts and* F *liabilities, the names, residences and occupations of his creditors, the securities held by them respectively, the dates when the securities were respectively given, the cause of his insolvency*, the date when he last balanced his accounts before becoming insolvent, the amount of his capital at the date of such balance, after providing for all his liabilities and making allowances for bad and doubtful debts, and such further and other information as is prescribed or as the Director General of Insolvency requires. G (Emphasis added.)

[17] Whilst s 16(3) of the same Act states:

> (3) *If the bankrupt fails without reasonable excuse*, proof whereof shall lie on him, *to* H *comply with the requirements of this section he shall be guilty of a contempt of court and may be punished* accordingly. (Emphasis added.)

[18] Section 16(1) of the Act dealt with a bankrupt's duty to make out and submit to the DGI, a statement of affairs in the prescribed form, verified by I affidavit, showing inter alia the particulars of his assets, debts and liabilities, the names, residences and occupations of his creditors, the securities held by them respectively, the dates when the securities were respectively given and the cause of his insolvency. Section 16(3) of the Act provided that if the bankrupt, without reasonable excuse, fails comply with the requirements of s 16, the

bankrupt shall be guilty of a contempt of court and may be punished accordingly. A

[19] Since the learned judge's finding was that the appellant/judgment debtor had failed to disclose his co-ownership of the said land and accordingly committed an offence under s 16(1) of the Act which is punishable under s 16(3) of the same Act, we are of the considered view that such a finding constituted a serious error of the part of the learned judge as s 16(1) of the Act only dealt with the failure of the appellant/judgment debtor, to submit to the Director General of Insolvency a statement of and in relation to his affairs in the prescribed form, verified by affidavit, showing the particulars of his assets, debts and liabilities, the names, residences and so forth. Section 16(1) of the Act does deal with the failure to disclose the appellant/judgment debtor's co-ownership of the said land. B C

[20] The learned judge fell into further error when he held that appellant/judgment debtor's application for discharge should dealt with under s 33(4) of the Act since the appellant/judgment debtor had committed an offence under s 16 of the Act. D

[21] Having perused the Act and the facts and circumstances of this case, we are of the considered opinion that the learned judge's presumption that the appellant/judgment debtor had committed an offence is also erroneous as the appellant/judgment debtor was not never charged in court for the offence of not disclosing his co-ownership of the said land and convicted of the same. E F

[22] We are inclined to hold that the phrase 'that the bankrupt has committed any offence under this Act or under any written law repealed by this Act or under s 421, 422, 423 or 424 of the Penal Code [Act 574]' as contained in s 33(4) of the Act meant that the bankrupt must have been charged in court of law by the DGI for that offence and was convicted accordingly. G

[23] We are in agreement with the judgment of David Wong Dak Wah J (as he then was) in *Development & Commercial Bank Bhd & Ors v Loke Theen Fatt* [2009] MLJU 1443; [2010] 5 CLJ 583 where he held: H

> Held: (2) The word 'committed' in s 33(4) of the Act meant that the bankrupt must have been charged in court by the DGI for that offence. Since the respondent had not been cited for contempt of court by the DGI, the respondent had not committed any offence under the Act as specified under s 33(4) of the Act. It followed that the application for the respondent's discharge must be dealt with pursuant to s 33(3) of the Act. Section 33(3) provided the court some guidelines as to how to exercise its discretion on whether or not to grant an order for discharge. Those guidelines required the court to look into the totality of the evidence or circumstance of the bankrupt and then ask itself the question whether it was fair or I

A just to grant a discharge. The starting point must be the DGI's report which in law must be taken as prima facie evidence of the respondent's conduct but it could be challenged by the creditors (*Re Lau Kah Lay & Anor; ex p Cold Storage (M) Bhd* refd). (paras 5 & 6). (Emphasis added.)

B **[24]** The case of *Re Joshua Tan Pin Pin; ex p William Jacks & Co (M) Sdn Bhd* [2007] 4 MLJ 534; [2007] 3 CLJ 153 is also instructive, where Kang Hwee Gee J (as he then was) held, inter alia, as follows:

C Held (1) Section 33(4) *of the Act is applicable only if the bankrupt had been 'convicted' of a bankruptcy offence. In the present case, the Official Assignee ('OA') had merely made an observation that the said offence had been committed but the bankrupt was not charged with the offence nor did the OA deem it fit to institute any contempt proceedings against him. It followed that the application for discharge should be considered under s 33(3) of the Act where the discretion of the court was fettered only by the consideration of equity, fairness and good conscience.* (para 6)

D (2) It was appropriate that the court make an order under s 33(3) of the Act, either to discharge the bankrupt absolutely or with conditions, on the following considerations: (i) he had been a bankrupt for the past 14 years; (ii) he had been contributing RM200 per month for the past 10 years for the benefit of his creditors;
E (iii) he was now 47 years of age; and (iv) it was unlikely that he would be able to improve his financial earning anymore than the salary of RM2200 per month he was currently earning. (para 6) (Emphasis added.)

[25] We are guided by the Supreme Court case of *Low Mun v Chung Khiaw*
F *Bank Ltd* [1988] 1 MLJ 263; [1987] 2 CLJ 400; [1987] CLJ Rep 172, Mohd Azmi SCJ said:

... since *bankruptcy is entirely a creation of statute law, the rule of strict construction* should be applied to the legislative words creating the act of bankruptcy ... (Emphasis added.)

G

[26] Further guidance can be found in *In Re Chinery* [1884] 12 QBD 342 at p 346 which is quoted in *Halsbury's Laws of England* (4th Ed), Vol 3 at pp 161–162 under a paragraph dealing with non-compliance with bankruptcy
H notice where Bowen LJ, inter alia, states:

Where words are found in a section of an Act which is defining an act of bankruptcy they *should be construed as strictly as if they occurred in a section which was defining an offence, because the commission of the act of bankruptcy entails disabilities to the person who commits it.* (Emphasis added.)

I

[27] Thus, in the light of the above, we are of the considered view that the learned judge's finding that the appellant/judgment debtor had committed an offence under s 16 of the Act is erroneous. The learned judge cannot summarily and arbitrarily convict the appellant/judgment debtor, without the right to be

heard. The appellant/judgment debtor may have an 'reasonable excuse' or defence and he should be allowed to advance such a defence. A

[28] Since the appellant/judgment debtor was never charged for an offence under s 16 of the Act, let alone convicted, the learned judge's findings was clearly wrong and without basis. B

[29] In the present case, the appellant/judgment debtor was never tried or charged for any bankruptcy offence and this was acknowledged by the DGI in para 39 of the DGI's Statutory Report which states that the appellant did not commit any offence under ss 421, 422, 423 and 424 of the Penal Code. C

[30] In so far as the learned judge's decision to consider the appellant/judgment debtor's application under s 33(4) of the Act, we are of the considered view that such a decision is without basis and wrong as the appellant/judgment debtor was never charged, tried or convicted of any offence. In the premises, the appellant/judgment debtor's application ought to be considered under s 33 of the Act. D

[31] We are of the considered view that the learned judge's reliance on the case of *Lok Kew v Nam Fatt Marketing Sdn Bhd and another case* [2019] MLJU 834; [2019] 1 LNS 1162, is erroneous too. In *Lok Kew*, the bankrupts clearly breached s 16(1) of the Act by failing to file their statement of affairs within 21 days of the receiving and adjudication order and also did not complied with the monthly repayments as required. However, in the present case, there was no contravention of s 16(1) of the Act as the appellant/judgment debtor had punctually filed his statement of affairs and has been paying RM200 per month to the DGI since July 2010, which sum was later increased to RM500. E F

[32] Thus, we are of the considered view that the learned judge has failed to apply the correct principles in holding that the appellant/judgment debtor had committed an offence under s 16(1) of the Act and in doing so, failed to take proper consideration of the DGI's Statutory Report. G

[33] Since the appellant/judgment debtor has not committed any bankruptcy offence, the learned judge's decision to consider the appellant/judgment debtor's application under s 33(4) of the Act for an order of discharge, is also without basis and erroneous. Thus, the appellant/judgment debtor's application for discharge should fall under s 33(3) of the Act. H

[34] In support of the appellant/judgment debtor's application ford is charge under s 33(3) of the Act, the appellant/judgment debtor averred, inter alia, that at the material time when he was adjudged a bankrupt, he was working as a manager for Sykt Belus Hasil Sdn Bhd with a monthly income of RM3,000. I

He was then given sanction by the DGI to continue to hold the post of manager in the same company on 2 August 2011.

[35] Further, after the appellant/judgment debtor was adjudged a bankrupt on 24 June 2010, he filed his statement of affairs on 6 July 2010 which was within the stipulated 21 days under s 16(2) of the Act. The DGI confirmed that the appellant/judgment debtor presented himself before the DGI for interview and questioning on 25 June 2010. The first creditors' meeting in respect of the estate of the appellant/judgment debtor was held on 12 December 2013.

[36] Based on the DGI's Statutory Report, the total proof of debts received by the DGI amounted to RM21,298,509.06 owed by companies in which the appellant/judgment debtor was being sued as one of the guarantors under Suit Nos S2–04 of 2006, S2–08 of 2006, S2–09 of 2006, S2–11 of 2008, S2–05 of 2008 and S22–10 of 2006 respectively. The proof of debts were submitted on 30 August 2010 which was shortly after the appellant/judgment debtor was adjudged bankrupt on 24 June 2010. The total amount of proof of debts admitted by the DGI is RM19,915,297.78.

[37] The DGI's Statutory Report also stated that the appellant has been paying RM200 per month to the DGI since July 2020, which was later increased to RM500 per month from August 2011. It is clear that the appellant/judgment debtor has been paying his debts diligently and is deeply interested in getting a discharge from his bankruptcy.

[38] Moreover, the DGI has declared three dividends amounting to RM205,127.57 to the creditors in respect of the monies realised by them. The DGI also stated in para 38 of the DGI's Statutory Report that during the course of their administration of the estate of the appellant/judgment debtor's bankruptcy case, he had always complied with all the directions issued by the DGI and those under the Act. The DGI's Statutory Report also concluded that none of appellant's/judgment debtor's conduct and affairs would bar the appellant/judgment debtor from being discharged from bankruptcy.

[39] In the present case, at the time when the appellant/judgment debtor applied for the current discharge on 17 July 2019, he was 60 years of age and has been living with the stigma of being a bankrupt for the last ten years. We noted that this is not a case where the appellant/judgment debtor was adjudged a bankrupt arising from his personal debt but as a result of him being a guarantor, to secure banking facilities for the bona fide business of his companies.

[40] Our consideration of the facts and circumstances of the appellant/judgment debtor's application showed that the appellant/judgment

debtor has satisfied the requirements laid down in s 33(3) of the Act and ought to have been discharged as a bankrupt.

CONCLUSION

[41] In the light of our above findings, we are of the considered opinion that the learned judge made errors in material findings of facts which warranted appellate intervention. We are of the respectful view that there are merits in this appeal and we unanimously allow the appeal and the appellant/judgment debtor's application for discharge from bankruptcy pursuant to s 3(3) of the Insolvency Act 1967 is allowed and the appellant/judgment debtor is thereby discharged from bankruptcy. The order of the learned judge dated 4 August 2022 dismissing the appellant/judgment debtor's application for discharge is set aside. We further award costs of RM5,000 subject to allocator to appellant/judgment debtor.

Appeal allowed; High Court's decision set aside; and appellant's application for discharge granted.

Reported by Ashok Kumar